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Nos. 05-908 and 05-915

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IN THE

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,

Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1, *et al.*,

Respondents.

CRYSTAL D. MEREDITH, Custodial Parent and Next Friend of JOSHUA RYAN McDONALD,

Petitioner,

v.

JEFFERSON COUNTY BOARD OF EDUCATION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND SIXTH CIRCUITS

BRIEF OF THE STATES OF NEW YORK, CONNECTICUT, ILLINOIS, IOWA, KENTUCKY, MAINE, MARYLAND, MISSOURI, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, RHODE ISLAND, UTAH, VERMONT, WASHINGTON, WISCONSIN, THE DISTRICT OF COLUMBIA, AND THE COMMONWEALTH OF PUERTO RICO AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

The Amici States respectfully submit this brief in support of Respondents Jefferson County Board of Education and Seattle School District No. 1. At issue is the prerogative of States and local educational agencies to determine the best methods for providing high quality, integrated primary and secondary education responsive to the specific needs and concerns of their local communities.

The States and their subdivisions are responsible for the public education of America's school children, and Amici States are firmly committed to the tradition of local control of those schools. Control of public K-12 education at the local level provides parents the opportunity to participate in decisionmaking regarding the education of their children, increases the accountability and responsiveness of school districts to local needs, and leads to greater community support for the schools. It also encourages experimentation and innovation in the schools' operation, leading to higher quality education.

At the same time, to effectively plan and operate their school systems, school boards require stability and predictability in the legal landscape governing their schools. For the past 35 years, school boards that have voluntarily sought to reduce racial isolation in their schools have done so with the understanding that federal courts also recognize the importance of local control of public schools and the value of integrated education. The importance of these values should be reaffirmed in these cases, and the Court should continue to afford a degree of deference, within constitutional limits, to States' and local school boards' educational decisions as to how to advance these goals.

SUMMARY OF ARGUMENT

The tradition of public elementary and secondary education in this country has long embraced as an important goal the assimilation of children from diverse backgrounds into a common community. Particularly in the last two generations,

many state and local educators have come to believe that racially isolated schools thwart that goal. These educators are of the view that education in a racially integrated environment fosters meaningful interaction among students of different racial and ethnic backgrounds, leading to the breakdown of racial stereotypes and the development of mutual understanding and respect among children of different races and ethnicities. In their considered judgment, education in an integrated environment prepares school children to succeed in a diverse work environment and inculcates values necessary to maintain a cohesive democratic society.

These educational judgments are entitled to deference when the Court assesses whether the promotion of integrated public schools is a compelling goal that can justify consideration of race. Public education is one of the most critical functions of state and local government. It plays a crucial role in preparing children for participation as citizens and in preserving our democratic values. Accordingly, federal courts should be reluctant to usurp the States' constitutional role by imposing their own views as to preferable educational methods, not only for reasons of federalism, but also because courts do not possess the same experience and expertise as do state and local educational agencies in addressing complex educational issues.

The effect of prohibiting school boards from considering race in formulating an integration plan would be profound. It would severely limit their ability to seek for children in their districts the benefits of learning in an integrated environment. The Equal Protection Clause does not require such a drastic retraction of the States' ability to voluntarily integrate their schools. Rather, recognition of the compelling nature of a State's interest in integrated schools is consistent with principles of equality that animate the Fourteenth Amendment, and serves to maintain the stability of a system of public education that has long relied on a State's prerogative to consider race to maintain racially integrated schools.

Finally, the requirement that a school district's consideration of race to advance its goals of providing high quality, integrated education be narrowly tailored does not mean that a court should substitute its own policy choices for those of the local school board. It is for the school board, not the courts, to make educational policy choices that balance the goal of integrated education with the other educational needs of the school community.

POINT I

MANY STATES AND LOCAL SCHOOL BOARDS HAVE DETERMINED THAT REDUCING RACIAL ISOLATION IS INTEGRAL TO THE EDUCATIONAL MISSION OF THEIR SCHOOLS

Providing an education that equips students to interact with persons from different racial and ethnic backgrounds and instills values free from destructive stereotypes and racial prejudice has been recognized by many state-run schools as an important component of primary and secondary education. Indeed, facilitating the assimilation of all children into a common community was one of the early purposes of mandatory public schooling in the States. *See, e.g.*, John Dewey, DEMOCRACY AND EDUCATION 25-26 (1916). The Court has long recognized this aspect of the public school's mission, characterizing the schools as "[d]esigned to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people." *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 216 (1948); *see also Ambach v. Norwick*, 441 U.S. 68, 77 (1979) (public schools are considered an "'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground") (quoting Dewey, DEMOCRACY AND EDUCATION 26).

Many States and local school boards have embraced this traditional educational philosophy, deciding that the educational goals of teaching tolerance and mutual cooperation among students of different races and ethnicities and instilling in them values that promote a cohesive society and a strong democracy are most effectively advanced in integrated settings. They have concluded that racial isolation severely undermines those goals, and that active measures are required to create integrated classrooms where those critical lessons are best learned. These local, state, and even federal policymakers have thus adopted measures designed to reduce racial isolation in public schools and secure for all children the benefits of learning in an integrated environment.

A number of States do this by directly prohibiting de facto segregation. New Jersey's constitution, for example, was amended in 1947 to prohibit both de facto and de jure segregation in the State's public schools. *See* N.J. Const. art. I, ¶ 5; Bernard K. Freamon, *The Origins of the Anti-Segregation Clause in the New Jersey Constitution*, 35 Rutgers L.J. 1267, 1301 (2004). The State's purpose in prohibiting even de facto segregation was grounded in the educational goals of teaching children to live together in a multi-racial society and promoting good citizenship and broad participation in mainstream affairs:

> In a society such as ours, it is not enough that the 3 R's are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better. It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs. Recognizing this, leading educators stress the democratic and educational advantages of heterogeneous student populations and point to the disadvantages of homogeneous student populations

> . . . . [T]he states may not justly deprive the oncoming generation of the educational advantages which are its due, and indeed, as a nation, we cannot afford standing by.

Booker v. Bd. of Educ., 212 A.2d 1, 6 (N.J. 1965); *see also* N.J. Admin. Code § 6A:7-1.7.

Connecticut's constitution also contains an anti-segregation clause, dating from 1965, which, together with an education clause enacted at the same time, requires the State to remedy severe racial and ethnic isolation regardless of intent. *See* Conn. Const. art. I, § 20; art. VIII, § 1. The clause embodies the belief that "[r]acial and ethnic segregation has a pervasive and invidious impact on schools, whether the segregation results from intentional conduct or from unorchestrated demographic factors. . . .When children attend racially and ethnically isolated schools, the[] 'shared values' [through which social order and stability are maintained] are jeopardized. . . ." *Sheff v. O'Neill*, 678 A.2d 1267, 1285 (Conn. 1996).

Similarly, California's state constitution requires school boards to take reasonably feasible steps to alleviate de facto segregation because, in the State's view, "'racial isolation in the schools . . . fosters attitudes and behavior that perpetuate isolation in other important areas of American life,'" such as housing and employment. *Crawford v. Bd. of Educ.*, 551 P.2d 28, 38 n.7 (Cal. 1976) (quoting United States Commission on Civil Rights, "Racial Isolation in the Public Schools" (1967)).

The Pennsylvania Human Relations Act likewise requires school boards to take corrective measures to remedy de facto school segregation because the State believes that "the best way to demonstrate the 'inherent worth of [one's] neighbor' is to place individuals in a situation where they are exposed to their neighbor," especially "if a child can become aware of his neighbor's capabilities before his prejudices have had a chance to develop." *Pennsylvania Human Relations Comm'n v. Chester Sch. Dist.*, 233 A.2d 290, 297 (Pa. 1967).

The New York Commission of Education has used its supervisory authority to direct local school boards to take steps to eliminate racial imbalance, regardless of its cause, because it judged racially isolated schools to be educationally inadequate. *See Vetere v. Allen*, 206 N.E.2d 174, 176 (N.Y. 1965). The Regents of the State of New York concluded:

> If children of different races and economic and social groups have no opportunity to know each other and to live together in school, they cannot be expected to gain the understanding and mutual respect necessary for the cohesion of our society. The stability of our social order depends, in large measure, on the understanding and respect which is derived from a common educational experience among diverse racial, social, and economic groups — integrated education.

Lee v. Nyquist, 318 F. Supp. 710, 714 (W.D.N.Y.), *aff'd*, 402 U.S. 935 (1971) (quoting Regents of the State of New York 1969 Restatement of Policy on Integration and the Schools).

And the Supreme Court of Washington, on certification from the Ninth Circuit in this case, reiterated that the State's school districts are empowered to work to end de facto segregated schools because "the justifications for racial integration," such as "teaching tolerance and cooperation among the races [and] molding values free of racial prejudice," "are strong and lie close to the central mission of public schools." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 72 P.3d 151, 162 (Wash. 2003).

Consistent with these educational principles and each State's unique policy, political, and administrative considerations, state legislatures have passed laws adopting varying means to facilitate the reduction of racial isolation. For example, several States provide guidelines for maintaining a diverse student body in conjunction with open choice or transfer

plans,[1] or cite prevention of segregation as a required consideration in drawing attendance lines.[2] Other States provide guidelines or funding for districts following voluntary desegregation plans, or permit transfers only within guidelines for racial integration of student bodies.[3] Yet other States closely regulate local school assignment and inter-district transfer plans, as well as magnet school programs, to promote school integration,[4] or require state authorities to oversee racial diversity even at the local school district level.[5] These and other States empower state officials to require districts to take affirmative measures to reduce racial isolation, which can include redistricting, new construction, majority-to-minority transfers, as well as a variety of other steps. Other States have enacted statutes that authorize local school districts to determine how to move toward more integrated, less racially isolated schools[6] or provide technical assistance or funding for districts to accomplish this goal.[7]

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1. *See* Fla. Stat. ch.1002.31(5)(f); Va. Code Ann. § 22.1-269.1(B).

2. *See* 105 Ill. Comp. Stat. 5/10-21.3.

3. *See* Ark. Code Ann. § 6-18-206(a)(4), (f); Neb. Rev. Stat. §§ 79-232(2), -238(2)-(4); Wis. Stat. § 118.51(7)(a).

4. *See* Mass. Gen. Laws ch. 71, §§ 37C, 37D, 37I; Mo. Rev. Stat. § 162.1060; N.J. Stat. Ann. § 18A:36B-4(b).

5. *See* Conn. Gen. Stat. §§ 10-226a-e; Minn. Stat. § 124D.896; N.Y. Educ. Law § 3601-a(36).

6. *See* Ind. Code Ann. §§ 20-33-1-1, 20-33-1-3(b); Cal. Educ. Code § 35160.5(b)(2)(A).

7. *See* Iowa Code § 282.18(3); Mass. Gen. Laws Ch. 76, §§ 12A, 12B; Mo. Rev. Stat. § 162.1060; N.Y. Educ. Law § 3601-a(36); Oh. Rev. Code Ann. § 3301.18(B); Wis. Stat. § 121.85.

And, as did the Seattle and Louisville school districts, countless school districts have fashioned their own voluntary plans to further their interest in the educational benefits that flow from reducing racial isolation, while taking into account local conditions and concerns. Some, like Louisville, did so following a declaration of unitary status to prevent re-segregation of their schools, and others do so with no finding of de jure school segregation. For example, some districts have joined together to allow voluntary inter-district majority-to-minority transfers to reduce racial isolation in each of the member districts. *See, e.g., Brewer v. West Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 741-42 (2d Cir. 2000). Other methods relied upon by individual districts to reduce racial isolation include voluntary intra-district majority-to-minority transfers, *see, e.g., Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 9-13 (1st Cir.) (en banc), *cert. denied*, 126 S. Ct. 798 (2005); *Riddick v. Sch. Bd.*, 784 F.2d 521, 527 (4th Cir. 1986); magnet schools with race-conscious admissions policies, *see, e.g., Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305 (4th Cir. 2002) (en banc); *Scott v. Pasadena Unified Sch. Dist*, 306 F.3d 646 (9th Cir. 2002); pairing, clustering, or grouping of schools, *see, e.g., Sch. Comm. v. Bd. of Educ.*, 287 N.E.2d 438 (Mass. 1972); *Guida v. Bd. of Educ.*, 213 A.2d 843 (Conn. 1965); busing, *see, e.g., Borders v. Bd. of Educ.*, 290 A.2d 510 (Md. 1972); or redrawn attendance zones, *see, e.g., Offermann v. Nitkowski*, 378 F.2d 22 (2d Cir. 1967); *Van Blerkon v. Donovan*, 207 N.E.2d 503 (N.Y. 1965).

Congress has likewise judged voluntary integration and the reduction of racial isolation to be extremely important goals. In enacting the Magnet Schools Assistance Program ("MSAP"),[8] Congress found that it is in the best interest of the United States to continue its support of local educational agencies that are "seeking to foster meaningful interaction among students of

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8. MSAP was reauthorized in 2002 as part of the No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

different racial and ethnic backgrounds, beginning at the earliest stage of such students' education," 20 U.S.C. § 7231(a)(4)(A), and "to ensure that all students have equitable access to high quality education that will prepare all students to function well in a technologically oriented and a highly competitive economy comprised of people from many different racial and ethnic backgrounds," *id.* § 7231(a)(4)(B). Congress chose to accomplish these goals by providing financial assistance to school districts for "the development and implementation of magnet schools programs" to promote "the elimination, reduction, or prevention of minority group isolation." *Id.* § 7231(b)(1), (2). Eligible districts are those involved in either voluntary or court-ordered desegregation of their schools. *Id.* § 7231(a)(1), (b)(2).

This Court, too, has observed that "[a]ttending an ethnically diverse school" may "prepar[e] minority children for citizenship in our pluralistic society, while, we may hope, teaching members of the racial majority 'to live in harmony and mutual respect' with children of minority heritage." *Washington v. Seattle Sch. Dist., No. 1*, 458 U.S. 457, 473 (1982) (quoting *Columbus Board of Education v. Penick*, 443 U.S. 449, 485 n.5 (1979) (Powell, J., dissenting)). The majority and the dissenting opinions in *Washington* were in agreement on this point. *See Washington*, 458 U.S. at 495 (Powell, J., dissenting) ("children of all races benefit from exposure to 'ethnic and racial diversity in the classroom'") (citation omitted). Indeed, in the opinion quoted by the majority in *Washington*, Justice Powell found much of the dispute as to the degree of educational benefit that results from integrated schools to be "beside the point" because, "it is essential that the diverse peoples of our country learn to live in harmony and mutual respect. This end is furthered when young people attend schools with diverse student bodies." *Penick*, 443 U.S. at 485 n.5 (Powell, J., dissenting).[9] Moreover, this Court

9. Because it was Justice Powell's opinion in *Bakke* that first drew the constitutional line between a university's permissible consideration (Cont'd)

considers a law school's related interest in enrolling a diverse student body in part to promote cross-racial understanding and the breakdown of racial stereotypes to be compelling. *See Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

POINT II

THE COURT SHOULD DEFER TO STATE AND LOCAL SCHOOL BOARD JUDGMENTS THAT REDUCING RACIAL ISOLATION PRODUCES ESSENTIAL EDUCATIONAL BENEFITS

When assessing the compelling nature of the state interest at stake here, the Court should defer to state and local educational agencies' judgments that reducing racial isolation in their public schools will yield educational benefits that are essential to their schools' missions. This Court afforded the University of Michigan Law School similar deference in *Grutter*, grounded in the university's First Amendment academic freedom and the attendant respect due its academic decisions. *See* 539 U.S. at 328-30 ("The Law School's educational judgment that [student body] diversity is essential to its educational mission is one to which we defer."). No less respect is due a state or local educational agency's experience and expertise regarding the proper mission and operation of K-12 schools, where the strong tradition of local control of public schools, grounded in a State's Tenth Amendment prerogatives, is at stake. *See Gregory v. Ashcroft*, 501 U.S. 452, 469 (1991) (the "Fourteenth Amendment does not override all principles of federalism").

(Cont'd)

of race to achieve the educational benefits of a diverse student body and unconstitutional racial balancing for its own sake – which he identified as the use of race simply to graduate more minority students, and not for any other reason – it is significant that Justice Powell consistently recognized the value of integrated K-12 education and the States' prerogative to seek those benefits for the children in their schools. *See Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 300 n.39, 307 (1978) (Powell, J.); *Penick*, 443 U.S. at 488-89 n.7 (Powell, J., dissenting); *Washington*, 458 U.S. at 501 n.7 (Powell, J., dissenting).

"No single tradition in public education is more deeply rooted than local control over the operation of schools. . . ." *Milliken v. Bradley* ("*Milliken I*"), 418 U.S. 717, 741-42 (1974); *accord Missouri v. Jenkins*, 515 U.S. 70, 131 (1995); *Freeman v. Pitts*, 503 U.S. 467, 490 (1992); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977). As a result, the Court has consistently recognized that it is the province of States and their subdivisions to make the complex judgments essential to establishing and fulfilling the educational mission of public K-12 schools. This is never more true than when a local school board seeks the educational benefits of integrated schools:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.

Swann v. Charlotte-Mecklenburg Bd. of Educ. ("*Swann I*"), 402 U.S. 1, 16 (1971); *accord North Carolina State Bd. of Educ. v. Swann* ("*Swann II*"), 402 U.S. 43, 45 (1971) ("We observed in *Swann* that school authorities have wide discretion in formulating school policy, and that as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." (citations omitted)).

Local autonomy of public schools serves a number of important values, central among them "afford[ing] citizens an opportunity to participate in decisionmaking" regarding the education of their children, which leads to greater accountability and responsiveness to local needs, higher confidence in and support for the school system, and improved quality of education. *Milliken I*, 418 U.S. at 742; *see also Freeman*, 503

U.S. at 490; *Bd. of Educ. v. Dowell*, 498 U.S. 237, 248 (1991). It also "encourages 'experimentation, innovation, and a healthy competition for educational excellence.'" *Milliken I*, 418 U.S. at 742 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973)); *accord Dowell*, 498 U.S. at 248.

In contrast, not only does "[u]surpation of the traditionally local control over education" diminish the quality of the education and weaken community support for the school system, it "deprives the States and their elected officials of their constitutional powers" to determine their educational goals. *Jenkins*, 515 U.S. at 138 (Thomas, J., concurring). Indeed, as this Court has long recognized, public education is "perhaps the most important function of state and local governments." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). By "inculcating fundamental values necessary to the maintenance of a democratic political system," public education performs a function that goes "to the heart of representative government." *Ambach*, 441 U.S. at 76, 77; *see Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("the public schools [are] the most vital civic institution for the preservation of a democratic system of government" (internal citation omitted)). It plays a crucial role in preparing individuals for participation as citizens, and in preserving the values on which our society rests. *Plyler*, 457 U.S. at 221; *accord Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986); *Rodriguez*, 411 U.S. at 29-30. A State or school board's educational policy decisions with respect to public schools are thus due a degree of deference not only as a matter of tradition, but because they reside "firmly within a State's constitutional prerogatives." *Gregory v. Ashcroft*, 501 U.S. at 462-63 (citing *Ambach*, 441 U.S. at 73-74); *see United States v. Lopez*, 514 U.S. 549, 565 (1995); *id.* at 583 (Kennedy, O'Connor, JJ., concurring) (federal law criminalizing gun possession within a school zone impinges on state sovereignty over primary and secondary education by "foreclos[ing] the States from experimenting and exercising their own judgment

in an area to which States lay claim by right of history and expertise").

Deference to a state or local educational agency's judgment regarding the proper mission of K-12 schools is also appropriate because education "presents a myriad of 'intractable economic, social, and even philosophical problems,'" *Rodriguez*, 411 U.S. at 42 (quotation omitted), and "[f]ederal courts do not possess the capabilities of state and local governments" in addressing them, *Jenkins*, 515 U.S. at 131. "Federal judges cannot make the fundamentally political decisions as to which . . . educational goals are to be sought, and which values are to be taught . . . When [they do so,] . . . they intrude into areas in which they have little expertise." *Id.* at 133; *see also Bd. of Educ. v. Rowley*, 458 U.S. 176, 207-08 (1982) ("courts must be careful to avoid imposing their view of preferable educational methods upon the States"). Even where there has been a violation of the Equal Protection Clause, "'federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.'" *Freeman*, 503 U.S. at 489 (quoting *Milliken v. Bradley* ("*Milliken II*"), 433 U.S. 267, 280-81 (1977)); *see also Penick*, 443 U.S. at 488 (Powell, J., dissenting) ("Courts are the branch least competent to provide long-range solutions acceptable to the public and most conducive to achieving both diversity in the classroom and quality education").

In recognition of these principles, the Court should defer to States' and school boards' educational judgments regarding the need to reduce racial isolation. Such deference comports with the deference extended to the state university in *Grutter*, and is also in line with the deference afforded States' and local school boards' educational choices in other instances where those decisions implicate constitutional concerns. For instance, because public education performs a function that goes to the heart of representative government, and because of the critical role teachers play in "shaping the students' experience to achieve educational goals," the Court applied only rational basis review,

rather than heightened scrutiny, to New York's judgment that citizenship should be a qualification to teach in its public schools. *Ambach*, 441 U.S. at 78. This principle of deference to state and local educational policy choices is also evident in several rulings by this Court which uphold restrictions imposed by school officials on students' freedom of expression, with an eye toward minimizing any constraints on the school's ability to fulfill its educational mission. *See, e.g., Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (holding that educators do not offend the First Amendment by exercising editorial control over student speech "so long as their actions are reasonably related to legitimate pedagogical concerns. This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges"); *Bethel Sch. Dist. No. 403*, 478 U.S. at 685 ("The First Amendment does not prevent the school officials from determining that" certain speech "would undermine the school's basic educational mission").

In addition, this Court has deferred to the expertise and sensitive political judgments of States when it assesses equal protection challenges to race-conscious electoral redistricting, which is similar to the educational judgments of state and local educational agencies in many respects. Like public elementary and secondary education, electoral redistricting is a traditional state function that goes to the heart of representative government, and is a most difficult subject for legislatures that requires consideration of "a complex interplay of forces." *Miller v. Johnson*, 515 U.S. 900, 915-916 (1995). As with public K-12 education, equal protection review of redistricting thus "represents a serious intrusion on the most vital of local functions," *id.* at 915, and application of equal protection principles in both contexts is a "most delicate task," *id.* at 905. Accordingly, with respect to both, States and their subdivisions "must have discretion to exercise the political judgment necessary to balance competing interests."

Id. at 915; *accord Easley v. Cromartie*, 32 U.S. 234, 242 (2001). Because redistricting often will require legislatures to consider race, preserving the State's discretion to balance competing interests in that context means that a court will not apply strict scrutiny to race-conscious redistricting unless race predominates over traditional redistricting principles. *Miller*, 515 U.S. at 912-16. For similar reasons, States must also have discretion to balance competing interests in the context of education policy, including whether to take voluntary steps to reduce racial isolation in their public schools if they deem it appropriate, even where achieving that goal may require consideration of race. *See Penick*, 443 U.S. at 489 (Powell, J., dissenting) ("The primary and continuing responsibility for public education, including the bringing about and maintaining of desired diversity, must be left with school officials and public authorities.").[10]

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10. This Court's decision in *Johnson v. California*, 543 U.S. 499 (2005), which held that California's segregation of prisoners by race and ethnicity is subject to strict scrutiny, is not inconsistent with deference to a school board's educational judgment that reducing racial isolation at the K-12 level will produce educational benefits essential to the board's mission. The deference at issue in *Johnson* went to whether strict scrutiny applied at all; here, as in *Grutter*, it goes to whether the State's interest is compelling. *See Grutter*, 539 U.S. at 328 ("Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university"). Moreover, while the Court in *Grutter* afforded a degree of deference to a university's academic decisions, the Court in *Johnson* went even further and *presumed* that California's asserted interest in prison safety was compelling. *See Johnson*, 543 U.S. at 514. The only question identified for remand in *Johnson* was whether California's policy was narrowly tailored to that end, and even with respect to that, the Court held that the "special circumstances that [prisons] present" can be taken into account. *Id.* at 515.

POINT III

RECOGNIZING THAT VOLUNTARY SCHOOL INTEGRATION IS A COMPELLING INTEREST COMPORTS WITH EQUAL PROTECTION PRINCIPLES

Following their pedagogical assessment that integrated learning environments are key to best educating children to live productively in a diverse society, school boards often make the related policy judgment that it is necessary to take limited race-conscious measures in order to secure those benefits for the children in their districts. Local school boards, state legislatures, Congress, and even this Court have recognized that consideration of race is often essential to achieving a heterogenous learning environment. To interpret the Equal Protection Clause to preclude all consideration of race to achieve that goal would severely limit a school board's ability to seek more integrated schools. On the other hand, recognizing the compelling nature of a State's interest in integrated schools is consistent with the principles that animate the Equal Protection Clause, and also serves to maintain the stability and predictability of a system of public education that for generations has operated with the understanding that States cannot, consistent with the Equal Protection Clause, intentionally segregate their schools, but they do have the discretion to purposefully integrate them.

In *McDaniel v. Barresi*, 402 U.S. 39, 41 (1971), a unanimous Court recognized that integrating a segregated school system will almost invariably require that students be assigned "differently because of their race." In that case, the Court upheld the use of race by the school board of Clark County, Georgia to voluntarily integrate its formerly segregated school system. While it could be assumed that the Georgia school system had been segregated by law (although the Court pointed out that there were no findings of a constitutional violation), there is no reason to think that the use of race is any less essential to remedying de facto segregation. *See Parents Involved in Cmty.*

Schs. v. Seattle Sch. Dist., No. 1 ("*PICS*"), 426 F.3d 1162, 1183 (9th Cir. 2005) (en banc) ("Because race itself is the relevant consideration when attempting to ameliorate de facto segregation, the District's tiebreaker must necessarily focus on the race of its students.").

Consistent with the importance placed in *McDaniel* on the consideration of race to achieve integrated schools, a number of state legislators and local school boards have established systems of voluntary majority-to-minority transfers to reduce racial isolation. *See, e.g., Penick*, 443 U.S. at 488 n.7 (Powell, J., dissenting) (holding out Wisconsin's voluntary, subsidized, majority-to-minority transfer provision, Wis. Stat. § 121.85, as "the sort of effort that should be considered by state and local officials and elected bodies"); *Brewer*, 212 F.3d at 741-42 (refusing to enjoin a school board's consideration of race pursuant to New York's law subsidizing voluntary inter-district transfers designed to reduce racial isolation, N.Y. Educ. Law § 3601-a(36)); Ark. Code Ann. § 6-18-206(a)(4) (permitting inter-district transfers provided the transfer "would not adversely affect the desegregation of either district"); Neb. Rev. Stat. §§ 79-232, -238(3)-(4) (requiring school districts with open enrollment programs to give first priority to students whose request would aid racial integration); N.J. Stat. Ann § 18A:36B-4(b) (Commissioner can restrict the number of students that can transfer from another district to maintain racial and ethnic diversity); *see also Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 241 (1973) (Powell, J., concurring) (noting benefits of voluntary majority-to-minority transfers to achieve school integration). Voluntary transfers are frequently relied upon to reduce racial isolation because they provide students with a choice among schools. Yet these programs would likely be banned or rendered impotent to achieve their intended goal if reducing racial isolation were not considered a compelling interest.

Magnet schools, conceived "as a voluntary alternative to busing" and considered a "typical and appropriate" tool to

decrease racial isolation in schools, also often consider race in their student admissions to accomplish that goal. *Belk*, 269 F.3d at 403; *see also Jenkins*, 515 U.S. at 92 (discussing benefits of magnet schools in school integration plan). Indeed, Congress not only anticipated that the use of race in MSAP-funded magnet school admissions may be necessary to accomplish the Act's goal of reducing minority group isolation, it specifically authorized race-conscious admissions criteria to accomplish that end. An application for MSAP funds must include an assurance that the applicant will not engage in discrimination based on race, color, or national origin in "the assignment of students to schools, or to courses of instruction within the schools, of such applicant, *except to carry out the approved [desegregation] plan*." 20 U.S.C. § 7231d(b)(2)(C)(ii) (emphasis added).[11]

In fashioning voluntary plans to reduce racial isolation that at times consider race – such as voluntary transfers or magnet schools – state and local governments have relied on the pronouncements of this Court suggesting that to do so is within their prerogative. On the same day in 1971, a unanimous Court decided two cases in which it stated that school authorities have broad discretion to decide as a matter of educational policy that the student body of each school in a district should reflect the racial composition of the district as a whole, *see Swann I*, 402 U.S. at 16; *Swann II*, 402 U.S. at 45. A third case decided that day stated that integration of a formerly segregated school district – one where there had been no finding of de jure segregation – almost invariably requires consideration of race, *see McDaniel*, 402 U.S. at 41. While none of the three cases expressly held that school authorities have discretion to use race in making student assignments to remedy de facto segregation, the Court did make its views on the subject known, and school districts have operated in reliance on that ever since. Indeed, it is difficult to see how a school district could "prescribe[]" the ratio of minority to white students in each school in the district,

11. A "desegregation plan" refers to plans to remedy either de jure or de facto segregation. 34 C.F.R. § 280.4(b).

"reflecting the proportion for the district as a whole," unless the school board considered race in making those assignments. *Swann I*, 402 U.S. at 16.

Since then, the Court has continued to recognize local school boards' discretion to seek voluntary school integration, and has never indicated that school boards cannot consider race for that purpose. For example, just two weeks after the *Swann* cases, the Court affirmed without opinion the decision of a three-judge court that struck down a New York law prohibiting student assignments based on race or for purposes of racial integration because the New York law would impede efforts to undo even de facto racial segregation. *See Lee*, 318 F. Supp. at 714. The Court confirmed that holding eleven years later in *Washington*, 458 U.S. 457, where it overturned a state initiative that mandated neighborhood school assignments, thereby precluding the possibility of assignments for the purpose of integration. Justice Powell, although dissenting from the Court's decision based on his view of a State's sovereign power to control its subdivisions, stated that on policy grounds he "would not favor reversal of the Seattle Board's decision to experiment with a reasonable mandatory [student assignment] program" to reduce racial isolation, even though he and the other dissenters presumed that mandatory student assignments for the purpose of racial integration involved assigning students on the basis of race. *Id.* at 489, 501 n.17. In Justice Powell's view, "the local school board – responsible to the people of the district it serves – is the best qualified agency of a state government to make decisions affecting education within its district." *Id.* at 494, 501 n.17.[12]

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12. Other opinions by Justice Powell further bolster the view that local school boards have broad discretion to consider race to achieve their goals of voluntary integration. *See Penick*, 443 U.S. at 488-89 n.7 (Powell, J., dissenting); *Bakke*, 438 U.S. at 307 (Powell, J.) (contrasting the denial of medical school admissions with voluntary secondary school integration); *see also Bustop, Inc. v. Bd. of Educ.*, 439 U.S. 1380, 1383

(Cont'd)

School districts seeking to voluntarily comply with state prohibitions of de facto school segregation would be in a particularly precarious spot if they could no longer consider race to reduce racial isolation in their schools. Indeed, state courts have upheld their right to consider race to comply with state mandates to remedy de facto segregation, as well as to voluntarily desegregate their schools, on many occasions. *See, e.g. Bd. of Educ. v. Bd. of Educ.*, 608 A.2d 914 (N.J. Super. Ct. App. Div. 1992), *aff'd*, 625 A.2d 483 (N.J. 1993); *Citizens for Better Educ. v. Goose Creek Consol. Indep. Sch. Dist.*, 719 S.W.2d 350 (Tex. Ct. App. 1986); *Tometz v. Bd. of Educ.*, 237 N.E.2d 498 (Ill. 1968); *Sch. Comm. v. Bd. of Educ.*, 227 N.E.2d 729 (Mass. 1967); *Vetere*, 206 N.E. 2d 174 (N.Y. 1965); *Guida*, 213 A.2d 843 (Conn. Super. Ct. 1965). It would be ironic, indeed, if after five decades of supervising the desegregation of public schools, and in anticipation of finally returning all school districts to local control, the Court now profoundly limits local authorities from finding ways on their own to maintain their integrated schools if they so choose.

The Equal Protection Clause does not require such a drastic turnaround from the Court's earlier pronouncements. The accommodation between the First Amendment's prohibition of state establishment of religion and its requirement that States permit its free exercise suggests that a comparable space exists between the Equal Protection Clause's prohibition of state segregated schools and a State's prerogative to integrate them. The Court has stated that there is "room for play in the joints" when negotiating the religion clauses of the First Amendment,

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(Cont'd)

(1978) (Rehnquist, J., in chambers) (refusing to stay a state court order requiring student reassignments based on race to remedy de facto segregation in part because, while Justice Rehnquist had "the gravest doubts that the Supreme Court of California was required by the United States Constitution to take the action that it has taken in this case," he had "very little doubt that it was permitted by that Constitution to take such action.").

Locke v. Davey, 540 U.S. 712, 719 (2004), and there is room here too, to accommodate both a State's Tenth Amendment prerogatives and the Equal Protection Clause's limitation on those powers. Just as there are some state accommodations of religion that do not run afoul of the establishment clause, there are some considerations of race by a local school board to remedy de facto segregation that do not run afoul of the federal Equal Protection Clause. *See Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972) ("By preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion."); *Rodriguez*, 411 U.S. at 42-44 (identifying the potential harm that imposing "inflexible constitutional restraint" on the policy judgments of state and local educational agencies may have on the "continued research and experimentation so vital to finding solutions to educational problems and to keep abreast of ever-changing conditions").

This accommodation between the Tenth Amendment and the Equal Protection Clause is possible because, even though remedying de facto segregation "draws a more stringent line than that drawn by the United States Constitution, the interest it seeks to further is scarcely novel." *Locke*, 540 U.S. at 722. That is, remedying de jure and de facto segregation seek the same end – integrated schools controlled by local authorities, not federal or state courts. Permitting local authorities to select the means they deem most effective to remedy de facto segregation serves those ends, and does not raise the concerns generally associated with the use of race. *Cf. id.* at 724.

For example, the use of race to promote voluntary school integration does not involve the racial stigma or stereotyping that so often animate this Court's equal protection jurisprudence involving the segregation of persons by race. *See, e.g., Brown*, 347 U.S. at 494 ("To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community. . . ");

Johnson, 543 U.S. at 507-09 ("by insisting that inmates be housed only with other inmates of the same race, it is possible that prison officials will breed further hostility among prisoners and reinforce racial and ethnic divisions"); *Shaw v. Reno*, 509 U.S. 630, 650 (1993) (separating voters into electoral districts solely on the basis of race "reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole").

Voluntary school integration does not separate children of different races; it brings them together, and the lessons learned in integrated classrooms tend to foster equality rather than hinder it. See Point I, *supra*. *Cf. Johnson*, 543 U.S. at 509 ("The United States contends that racial integration actually 'leads to less violence in BOP's institutions and better prepares inmates for re-entry into society.'"); *Linmark Assocs., Inc. v. Willingboro*, 431 U.S. 85, 94-95 (1977) ("This Court has expressly recognized that substantial benefits flow to both whites and blacks from interracial association . . ."). Those lessons do not depend on associating race or ethnicity with any particular set of experiences or viewpoints, and thus do not rely on stereotypes or invoke the stigmatic harm of using race as a proxy for another characteristic. *Cf. Johnson*, 543 U.S. at 511 ("When government officials are permitted to use race as a proxy for gang membership and violence without demonstrating a compelling government interest and proving that their means are narrowly tailored, society as a whole suffers."). And where, as here, school admission is not competitive – that is, not based on the abilities or achievements of the students – there is not the same risk of stigmatic harm associated with traditional affirmative action. *Cf. Grutter*, 539 U.S. at 373 (Thomas, J., dissenting) (elite law school admissions); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion) (contracting); *United States v. Paradise*, 480 U.S. 149, 188 n.2 (1987) (Powell, J., concurring) (employment).

POINT IV

PETITIONERS' PREFERRED METHODS FOR ACHIEVING INTEGRATION ARE NOT REQUIRED BY LAW

Petitioners' application of the narrow tailoring factors is fundamentally flawed because it does not take account of the special context of K-12 education, and much of their analysis amounts to no more than Petitioners' preferred policy prescriptions. "The purpose of the narrow tailoring requirement is to ensure that 'the means chosen "fit" . . . the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'" *Grutter*, 539 U.S. at 333 (quoting *J. A. Croson Co.*, 488 U.S. at 493 (plurality opinion)). Strict scrutiny is necessarily a context-specific inquiry, and narrow tailoring factors are a framework to assist courts in determining the sincerity of the motive for using race. *See Grutter*, 539 U.S. at 327, 339-40. The federal judiciary's long experience with school desegregation is a reminder that "there will be more than one constitutionally permissible method" of integrating a public school system. *Rodriguez*, 411 U.S. at 42 (citation omitted).

1. A flexible K-12 student assignment plan does not require consideration of the same factors relevant to university admissions.

Petitioners argue that the Seattle and Louisville plans are not narrowly tailored to any goal except "outright racial balancing" because they supposedly employ rigid quotas rather than the individualized assessment upheld in *Grutter*. *PICS* Pet. Br. at 43-44; *see Meredith* Pet. Br at 7-8 . But Petitioners' attempt to import wholesale into this case the specific elements of the narrowly-tailored law school admissions plan approved in *Grutter* is misguided. In *Grutter*, the Court developed a narrow tailoring framework "calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education." 539 U.S. at 334. The Court's emphasis on the specific circumstances of university admissions in *Grutter*

belies any attempt to rigidly apply its reasoning to K-12 schools. *See id.* ("the very purpose of strict scrutiny is to take . . . 'relevant differences into account.' ") (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 227, 228 (1995)); *United States v. Fordice*, 505 U.S. 717, 728-29 (1992) ("a state university system is quite different in very relevant respects from primary and secondary schools," including that K-12 schools are generally "fungible," and students do not choose whether to pursue an education).

The differences between the admissions process at the University of Michigan Law School and the student assignments here highlight the distinction between the goals of enrolling a diverse university class and promoting integrated elementary and secondary schools. The interest identified in *Grutter* was that of a university selecting "those students who will contribute the most to a robust exchange of ideas." 539 U.S. at 333. A critical mass of minority students is only one element of a form of diversity that also values the contribution of students who, for example, "have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, " or have "unusual intellectual achievement, employment experience, nonacademic performance, or personal background." *Id.* at 338.

As with the goal of enrolling a "critical mass of minority students" that was approved in *Grutter*, the goal of racially integrated schools is "defined by reference to the educational benefits" that it "is designed to produce." *Id.* at 333. The benefits of educational diversity in elementary and secondary public schools are related to the goal of diversity in higher education, but are still very different. Its benefits do not arise primarily from "enlightening and interesting" "classroom discussion" among students with "the greatest possible variety of backgrounds." *Id.* at 330. They are, instead, based on the simple fact that contact with peers of another race at a young age in a school environment is seen as the best available tool for inculcating values of racial tolerance. For the youngest students, this is a critical opportunity to form relationships that are truly

color-blind before questions of difference are even present. As Justice Scalia suggested in his dissent in *Grutter*, these values are not so much "taught" as "learned." *Id.* at 347. See Point I, *supra*. That the lesson is learned primarily from experience does not make it any less a legitimate part of the K-12 educational mission. "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order." *Bethel Sch. Dist. No. 403*, 478 U.S. at 683. While the educational benefits of integrated education are not identical to those that flow from a diverse student body at a university, they are no less real.[13]

Moreover, that a school board opts not to run a competitive, Harvard-style admissions process does not makes its own student assignment plan a quota. The danger of a quota, or "a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups,'" is not present here, since the assignment plans do not reserve a fixed number of slots for any school, and thus no student is insulated from competition with students of other races. *Grutter*, 539 U.S. at 334-35 (quoting *J.A. Croson Co.*, 488 U.S. at 496 (plurality opinion)). In the plans here, flexibility is shown in other ways, for example, through consideration of

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13. The *PICS* Petitioner also argues, Pet. Br. at 30, 37, that the Seattle plan is no more than racial balancing because it does not consider ethnicity. But whether advancing a school board's educational goals requires it to take active steps to consider any particular ethnicity, in addition to or instead of race, can only be determined by the board itself, in assessing the history, demographics, residential patterns, politics, and culture of the locality, among other factors that inform how it defines its mission. *See* Point II, *supra*. Moreover, Petitioner ignores the fact that U.S. Department of Education regulations administering the MSAP also do not differentiate among different ethnicities in defining "minority group isolation." *See* 34 C.F.R. § 280.4(b) (defining "minority group isolation" as "a condition in which minority group children constitute more than 50 percent of the enrollment of the school").

students' own rankings of their school preferences, sibling preferences, geographical preferences, or by limiting consideration of race to oversubscribed schools or to certain grades.

The *PICS* Petitioner confuses this flexibility with underinclusiveness, pointing to the fact that race is only considered in the Seattle Plan with respect to oversubscribed schools. *See* Pet. Br. at 40. But it is the province of the school board whether to design a plan that balances, as Seattle's did, the district's integration goals, student choice, and family cohesion and convenience. Such a plan shows flexibility, not insincerity, and while it may reduce racial isolation to a more limited degree, that does not make it unconstitutional. *See Penick*, 443 U.S. at 482 n.2 (Powell, J., dissenting) ("an integrated system does not mean that '*every school* must in fact be an integrated unit'" (quoting *Keyes*, 413 U.S. at 227)); *Crawford*, 551 P.2d at 31 ("We have learned that the fastest path to desegregation does not always achieve the consummation of the constitutional objective; it may instead result in resegregation. In the absence of an easy, uniform solution to the desegregation problem, plans developed and implemented by local school boards, working with community leaders and affected citizens, hold the most promising hope for the attainment of integrated public schools in our state.").

2. The proposed race-neutral alternatives are not required by law.

The *PICS* Petitioner further argues that the Seattle plan is not narrowly tailored because there are viable alternatives to achieve the same educational benefits, such as consideration of socioeconomic status in lieu of race, or expansion of specialized school programs. Pet. Br. at 40-43. A school district should generally consider viable alternatives to race in its efforts to promote diversity and to create a teaching environment in which students will learn tolerance and appreciation for the differences of others. Petitioner's argument, however, misses the mark. First, the district court found that race-neutral alternatives would not allow the School District to meet its goals of racial diversity. *See PICS*,

426 F.3d at 1188-89. Second, Petitioner fails to recognize that relying upon another characteristic as a clumsy proxy for race not only risks potentially undesirable stereotypes, but it is also unnecessary. If a racially balanced school system is a legitimate goal for school districts to pursue, they must be permitted to make school assignments in a manner that will allow this goal to be achieved. *See Comfort*, 418 F.3d at 219 (Boudin, C.J., concurring).[14]

Third, Petitioner ignores the possibility that a school board may find it inconsistent with its educational mission to establish specialized programs at any particular school. In *Grutter*, this Court recognized that courts should not second-guess the educational benefits that educators have determined to be important, holding that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative." 539 U.S. at 339-40. The reasons to respect a school district's educational judgments are just as compelling here. See Point II, *supra*. Even when it acts to remedy de jure segregation, a federal court has limited authority to make substantive policy decisions in the realm of public education. *See, e.g., Jenkins*, 515 U.S. at 112-13 (O'Connor, J., concurring). The Court has emphasized this bounded role, and has "specifically admonished" courts to "'take into account the interests of state and local authorities in managing their own affairs.'" *Id.* at 113 (citation omitted). Although federal courts have the remedial authority to address a constitutional violation, they may not substitute their own judgment for that of local school districts. *Id.* at 98-99. Courts should leave the administration of these

14. Nor is the federal magnet school program, touted by the United States as a preferred race neutral alternative, truly that. *See* U.S. Br. in *PICS* at 25-27. The MSAP considers race at the outset, in deciding which schools to fund. *See* 34 C.F.R. § 280.2(b)(2). Moreover, in authorizing a funded magnet school to consider race in student admission to implement its desegregation plan, *see* 20 U.S.C. § 7231d(b)(2)(C)(ii), Congress implicitly recognized that sometimes consideration of race is necessary for a magnet school to effectuate the program's goal of reducing racial isolation.

plans to "those much closer to the affected community, who have the power to reverse or modify the policy should it prove unworkable." *PICS*, 426 F.3d at 1196 (Kozinski, J., concurring). "An integrated school experience is too important to the nation's children for this Court to jeopardize the opportunity for such an experience by constructing obstacles that would discourage school officials from voluntarily undertaking creative programs." *Higgins v. Bd. of Educ.*, 508 F.2d 779, 795 (6th Cir. 1974).

3. The assignment plans do not impose an undue burden on any student.

A K-12 student assignment plan does not impose an undue burden on students whenever they are denied admission to their first choice school, as Petitioner suggests. *See PICS* Pet. Br. at 45. In assessing the constitutionality of a school board's measures to promote integration, a significant factor is the burden placed on students and their families. Any burden must be reasonable and equitably distributed among students of all races. *See, e.g., Valley v. Rapides Parish Sch. Bd.*, 702 F.2d 1221, 1228-29 (5th Cir. 1983); *United States v. Hendry County Sch. Dist.*, 504 F.2d 550, 554 (5th Cir. 1974). Where, as here, the schools in the district provide a comparable education, admission to a school is not based on competitive criteria, and all students have a choice to attend a school in their neighborhood, any burden from a race-conscious integration plan is minimal, and not constitutionally cognizable.[15] Students have no constitutional right to attend a particular school. *See, e.g., Bustop, Inc.*, 439 U.S. at 1383; *McDaniel*, 402 U.S. at 42. And in contrast to the use of race to segregate students, racial integration benefits all students, regardless of race. "That a

15. *See Bakke*, 438 U.S. at 300 n.39 (Powell, J.) (finding the denial of admission to medical school to be "wholly dissimilar" to the position of a student bused to a comparable school in another neighborhood in the K-12 context: "Petitioner did not arrange for respondent to attend a different medical school in order to desegregate Davis Medical School; instead, it denied him admission and may have deprived him altogether of a medical education").

student is denied the school of his choice may be disappointing, but it carries no racial stigma and says nothing at all about that individual's aptitude or ability." *PICS*, 426 F.3d at 1194 (Kozinski, J., concurring). And importantly, to the extent there is a burden at all, it is not imposed disproportionately on students of any one race. *Id.* at 1191.

4. The assignment plans are subject to periodic review.

The *PICS* Petitioner argues that the Seattle assignment plan is not narrowly tailored because there is no sunset provision. *See* Pet. Br. at 46. But both the Louisville and Seattle plans are subject to periodic review. Similar review was held to be sufficient to uphold the constitutionality of the Michigan Law School's student admissions policy in *Grutter*. *See* 539 U.S. at 342. Moreover, unlike with competitive university admissions or other forms of affirmative action, the choice plans here are self-limiting. Race is considered only as long the schools are not integrated, and it is not possible to consider race beyond the point at which it is needed to achieve integrated schools.

CONCLUSION

For the foregoing reasons, the judgments of the United States Courts of Appeals for the Sixth and Ninth Circuits upholding the constitutionality of the Louisville and Seattle student assignment plans should be affirmed.

Respectfully submitted,

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